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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 837

AUGUST SORCEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner and three others were found guilty (R. 324, 349), after a jury trial in the District Court for the Eastern District of Wisconsin, on all counts of a four-count indictment (R. 1–8) charging three substantive violations of, and a conspiracy to violate, the counterfeiting laws (Sections 150, 151, and 154, of the Criminal Code and Section 178A of the Code, added by the Act of September 27, 1944, 58 Stat. 752; 18 U. S. C. 264, 265 and 268, and 18 U. S. C., Supp. IV, 294). A motion for a new trial (R. 341–345, 349–353; see also R. 326–336) was denied (R. 336, 356), and petitioner was sentenced to imprisonment for seven years on each of the substantive counts and two years on the con-

spiracy count, the sentences to run concurrently (R. 336–337, 357–358). The judgment of conviction was affirmed by the Circuit Court of Appeals for the Seventh Circuit on November 17, 1945 (R. 376–382; 151 F. 2d 899), and a petition for rehearing was denied on December 7, 1945 (R. 383). Subsequently, on January 2, 1946, another petition for rehearing, purportedly based on newly discovered evidence that a co-defendant and not petitioner was the ringleader in the commission of the offenses, was filed in the circuit court of appeals by newly retained counsel (R. 389–390). On January 10, 1946, after the United States had filed an answer to this petition supported by affidavits and copies of correspondence between petitioner's counsel and the trial judge (R. 391–398), the court below denied the petition without opinion (R. 399).[1]

In his petition for a writ of certiorari, which was filed on February 11, 1946, petitioner relies solely upon alleged errors of the trial court which were assigned as such on his appeal to the circuit court of appeals (see R. 366).[2] The judgment of

[1] Further details of this petition are set forth *infra*, 3.

[2] Thus he complains that on the hearing of his motion for a new trial the trial court erroneously limited examination of the court's bailiff who had charge of and who communicated to the jury a message from the judge (Pet. 3, 6, 8–9); that it was prejudicial error to permit the introduction of affidavits of two jurors to show what the bailiff said to the jurors (Pet. 3, 6, 9–11); and that the court abused its discretion in imposing a severe sentence on petitioner because of the acts of his trial counsel (Pet. 3, 6, 7–8, 11–14).

the circuit court of appeals affirming his conviction was based upon an opinion which rejected these and other claimed errors (see R. 380–382) and it is that judgment as to which petitioner here seeks review. Under Rules 11 and 13 of the Criminal Appeals Rules the petition for a writ of certiorari to review that judgment was required to have been filed within thirty days, exclusive of Sundays and holidays, after December 7, 1945, when the first petition for rehearing with respect to the judgment was denied, or not later than January 14, 1946. The petition for a writ of certiorari is, therefore, untimely and should be denied for want of jurisdiction. See *United States ex rel. Coy* v. *United States,* 316 U. S. 342, 344.

In his so-called second petition for rehearing in the circuit court of appeals, based on allegedly newly discovered evidence, petitioner did not ask for reconsideration of the judgment affirming his conviction. The petition was predicated solely upon an affidavit of petitioner's newly retained counsel stating that the assistant United States attorney who prosecuted the case had informed the trial judge and counsel that since the trial he had received information which "convinced him that Marty King, a codefendant in said case, and not August Sorcey, was the ringleader in the commission of the offenses charged" and that "this evidence was such that he would not oppose a reduction in the sentence imposed on Sorcey"

(R. 389–390). The petition requested the court to compel the prosecutor "to produce before this Court said after discovered evidence" (R. 389). Petitioner did not claim that this evidence would have resulted in his acquittal, nor did he even intimate that he desired a new trial. The claimed newly discovered evidence concerned only the degree of petitioner's guilt, i. e., whether he was the "ringleader" in the commission of the offenses, and the circuit court of appeals in denying this petition cannot be said to have reexamined its denial of the original petition for rehearing of the judgment affirming the conviction. We submit that there is no reason why the presentation of the second petition for rehearing should extend the time within which petitioner was required to file his petition for a writ of certiorari to review the judgment affirming his conviction, any more than a motion filed in a district court for a new trial on the ground of newly discovered evidence should revive a right of general appeal previously barred by the lapse of time. See *Fewox* v. *United States,* 77 F. 2d 699, 700 (C. C. A. 5); *Batson* v. *United States,* 129 F. 2d 463 (C. C. A. 10). *Contra, Paddy* v. *United States,* 143 F. 2d 847 (C. C. A. 9), certiorari denied, 324 U. S. 855, but see our memorandum in the *Paddy* case, No. 334, O. T. 1944, pp. 5–10. A contrary view would permit extension, by means of the device used here, of the time limit for filing a petition for a writ of certiorari seeking review

of alleged trial errors to a degree which it is impossible to believe this Court intended, for a principal purpose of the Criminal Appeals Rules "is to force early termination of criminal cases." *Fewox* v. *United States, supra*, at 700.[3]

At best, petitioner's application for a writ of certiorari is timely only as to the order of the circuit court of appeals denying his second petition for a rehearing. He does not challenge this order, however, and it is manifest from the record that this petition was properly denied, for he made no showing justifying any relief. Petitioner's sentence of seven years' imprisonment (pp. 1–2, *supra*) was well within the maximum limits[4] and, as the circuit court of appeals pointed out in the opinion affirming petitioner's conviction (R. 380–381), it had no power to reduce the sentence merely because it might be regarded as too severe. See also *Holmes* v. *United States*, 134 F. 2d 125, 135 (C. C. A. 8), certiorari denied, 319 U. S. 776. Since the so-called "newly discovered evidence" concerned only the degree of petitioner's guilt it did not, of

[3] "Determination of guilt or innocence as a result of a fair trial, and prompt enforcement of sentences in the event of conviction, are objectives of criminal law." *United States* v. *Johnson*, Nos. 115 and 116, O. T. 1945, decided February 4, 1946.

[4] Petitioner could have been sentenced to 15 years' imprisonment and fined $5,000 on each of counts 1 and 2 (18 U. S. C. 264, 265), 10 years' imprisonment and a fine of $5,000 on count 3 (18 U. S. C. 268), and 15 years' imprisonment and a fine of $5,000 on count 4 (18 U. S. C., Supp. IV, 294).

course, justify a remand of the cause to the trial court for consideration there of a motion for a new trial.[5] And, finally, the alleged statement by the assistant United States attorney that he had information showing that petitioner was not the ringleader (R. 390) was unequivocally denied in that official's affidavit (R. 392–393), and his denial was confirmed by the trial judge's letter to petitioner's counsel, a copy of which was attached to that affidavit. It should also be noted that the judge stated in his letter that a reduction in petitioner's sentence "will not be granted." There was no occasion, therefore, for the circuit court of appeals (R. 394) to remand the cause to the district court for consideration of a motion to reduce the sentence.

Respectfully submitted.

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MARCH 1946.

[5] Rule 2 of the Criminal Appeals Rules provides:

"(3) Except in capital cases a motion for a new trial solely upon the ground of newly-discovered evidence may be made within sixty (60) days after final judgment, without regard to the expiration of the term at which judgment was rendered, unless an appeal has been taken and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before execution of the judgment."

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